Senate Intelligence Committee Releases Report on Patriot Act, including Senator Feinstein's Dissent on Expanding FBI Powers Without Checks and Balances

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Washington, DC – The U.S. Senate Intelligence Committee today released a report on its markup of the Patriot Act. Following are the Additional Views of Senators John D. Rockerfeller (D-WV), Carl Levin (D-MI), Dianne Feinstein (D-CA), Ron Wyden (D-OR), Evan Bayh (D-IN), Barbara Mikulski (D-MD) and Jon Corzine (D-NJ). Second is the text of amendments by Senator Feinstein and others. And third are Senator Feinstein's minority views in which she details her opposition to expanding the Act without adequate checks and balances.

ADDITIONAL AND MINORITY VIEWS OF SENATORS ROCKEFELLER, LEVIN, FEINSTEIN, WYDEN, BAYH, MIKULSKI, AND CORZINE

The primary task of the Congress this year, with respect to investigatory powers in national security investigations, is action on renewal of sixteen USA PATRIOT Act authorities that are scheduled to sunset, or expire, at the end of this year. The accompanying task is to correct any defects in or otherwise improve these provisions.

Sections 101 and 102 of the Committee bill would make permanent nine PATRIOT Act authorities (the others are within the sole jurisdiction of the Committee on the Judiciary), while also extending a sunset in the recently enacted Intelligence Reform Act for so-called "lone wolf" surveillance authority. In extending that sunset, the Committee accepted a proposal advocated by Senator Corzine that the Department of Justice should gain further experience under this new authority before Congress determines whether to make it permanent.

Section 211 of the Committee bill -- by remedying some of the problems with Section 215 of the PATRIOT Act pertaining to orders by the Foreign Intelligence Surveillance Court for business records -- is a step in the right direction toward accomplishing the second task. Also, Section 216 of the Committee bill, by increasing the maximum duration of certain Foreign Intelligence Surveillance Court orders, improves the FISA process by enabling Department of Justice personnel and the FISA Court to devote attention to new applications and other urgent matters.

However, the Committee bill goes beyond these core tasks. Notably, it adds a wide-ranging "administrative subpoena" to the Attorney General's and the FBI's broad powers in national security investigations. This significant new investigative authority and other proposed

additions or changes to present law, as these additional views explain, are problematic and may even be damaging to our national security protections.

1. Administrative Subpoenas

The bill proposes to add a new title to FISA to authorize the issuance of administrative subpoenas for production of records. The expressed justification for administrative subpoenas – which would not be reviewed by a court unless challenged by the recipient of the subpoena or if there is an enforcement action – is that they may be needed in emergency circumstances when alternative means for obtaining information might result in unacceptable delay.

Congress has granted subpoena authority to many agencies that exercise economic or other regulatory powers. Several enactments, in recent years, have provided subpoena authority to the Attorney General in controlled substances, health fraud, and child pornography cases, and to the Secretary of the Treasury in matters involving imminent threats to persons protected by the Secret Service. Three of these measures, collected in 18 U.S.C. § 3486, contain important checks on the Government's use of that authority. None is as potentially vast in scope as the proposal to make this power available in national security investigations. Moreover, in none of these other matters had Congress already provided for an array of other powers, as it has done for intelligence investigations, including for a special court -- the Foreign Intelligence Surveillance Court -- whose sole mission concerns the grant of investigative powers.

When testifying before the Committee, the FBI could not document significant past or current instances when national security investigations faltered or were hindered due to lack of an administrative subpoena authority. The FBI argued that such a circumstance could exist in the future when immediacy might dictate moving quickly with a subpoena for records without prior judicial review. This may be true, but based on both demonstrated and anticipated need, the use of any such authority without prior review should be the exception, not the rule.

Notwithstanding the desire of the Administration for additional authority, the responsibility of Congress is to determine if there is a convincing need that justifies departure from the careful methodology of the Foreign Intelligence Surveillance Act. As part of that assessment, Congress should consider whether any such need is not met by the array of other authorities now available for obtaining business records in national security investigations, including through National Security Letters and grand jury subpoenas. If there is such a need, particularly a need that goes beyond emergencies, it has not been demonstrated in the legislative record presented to the Committee by the Department of Justice or established by the Committee's own factual inquiry. On the present record, all that Congress has is the Administration's wish for more.

By one vote, the Committee rejected an amendment by Senator Feinstein (set forth in the appendix to these views) to limit administrative subpoena authority to emergency use. It would have authorized administrative subpoenas upon the certification of the Attorney General or FBI Director, or their designees, that (1) it is impracticable to obtain in a timely fashion, by an order of the FISA Court or other means, the records or materials required and (2) there is a reasonable belief that there is an emergency need for the records or materials in order to protect against

terrorism. The amendment would also have required approval from a U.S. Attorney or an Assistant Attorney General prior to issuance of an administrative subpoena, rather than at the sole discretion of an FBI Special Agent in Charge. To facilitate rapid action, approval could be oral as long as it is reduced to writing as soon as possible. The Feinstein amendment would tailor administrative subpoena authority to the need presented by the Administration: the occasional emergency when it is impractical to obtain a FISA Court order or other enforceable demand such as a grand jury subpoena.

In our view, absent an emergency, maintaining pre-issuance judicial review of requests for orders to produce business records is an important check against potential abuse in the investigative process. The Administration acknowledges that the FISA Court has worked well and efficiently in reviewing subpoena requests. Unless changed, the bill effectively puts the court out of business with respect to business records, and puts the current subpoena authority of the court in the hands of the investigators. This is not necessary, justified, or wise.

The Committee also rejected by a one-vote margin an amendment by Senator Levin (also set forth in the appendix to these views) to establish a procedure to assess the continuing need, in individual cases, for nondisclosure requirements. The Committee's bill provides that disclosure of the receipt of an administrative subpoena -- other than to persons necessary to carry out production of records, an attorney, or other persons as permitted by the FBI – is prohibited if the Attorney General or a designee certifies that a danger to national security may result. The bill also provides for criminal penalties for knowing violation of this prohibition. The length of the ban is not limited. It could prevent the recipient of a subpoena from exercising First Amendment rights to protest government action, including by bringing abuses to the attention of members of Congress or Inspectors General.

We recognize the importance of requiring nondisclosure in some cases, but any such requirement should be subject to judicial review. Senator Levin's amendment would have provided for periodic review of the nondisclosure requirement, enabling the FBI to extend the nondisclosure ban for repeated 90 day periods upon a showing to a court that a danger to national security may result. A similar provision exists in current law on criminal administrative subpoenas, 18 U.S.C. § 3486, which provides that nondisclosure orders issued by district courts last for ninety days subject to renewal.

While the appropriate length of time between the review of orders is open to discussion, the essential point of the amendment, which we strongly support, is that the combination of factors in the Committee's bill – a limitation on speech that is potentially for life and enforced by criminal penalties – makes it imperative that there at least be periodic court review of the requirement that a citizen or company remain silent about the receipt of a governmental subpoena.

2. Section 215 of the PATRIOT Act

The ability of intelligence as well as law enforcement investigators to obtain relevant records expeditiously is critical. They may provide information that enables investigators to pinpoint more exactly what additional investigatory tools are necessary. Legally enforceable

demands for records – whether they be called orders or subpoenas – also allow investigators to obtain information in a manner that is less intrusive than electronic surveillance or physical searches.

Section 215 of the PATRIOT Act (which amended Title V of the Foreign Intelligence Surveillance Act) significantly expanded the Government's ability to obtain "tangible things," including records, in international terrorism and other national security investigations. In doing so, the broad reach of Section 215 has prompted a great deal of concern about the potential overreaching of Government demands.

The amendments reported by the Committee address some key concerns about Title V, as amended by Section 215. First, the amendments make explicit that the Government's application to the Foreign Intelligence Surveillance Court, for an order to obtain business records or other tangible things, must be for items that are "relevant" to a foreign intelligence investigation. Bolstering that requirement, the Committee's bill also provides, as advocated by Senator Wyden, that the application to the court "shall include an explanation by the applicant that supports the assertion of relevance."

The Committee's bill addresses one aspect of the nondisclosure regime established by Title V of FISA. As amended in 2001 by Section 215 of the PATRIOT Act, Title V provides that no person shall disclose to any other person, other than persons necessary to produce the things required by an order, that the FBI has sought or obtained things under the section. The Attorney General told the Committee that he supports a clarification in Title V that permits disclosure to an attorney. The bill, accordingly, makes clear that the recipient of an order for production of records may disclose the order to an attorney to obtain legal advice or assistance.

While no amendment was offered in Committee to address other aspects of Title V's nondisclosure requirement, the reasons warranting periodic review of the related nondisclosure requirement for administrative subpoenas also apply to Title V and merit the attention of Congress as it considers amendments to that title.

In accord with the Attorney General's further representation to the Committee, the bill also provides explicitly for judicial review. Following receipt of an order to produce, but before production, the recipient of the order may petition the Foreign Intelligence Surveillance Court to modify or set it aside. In recognition that the Government's response may include classified information, the bill provides that the court shall first review the Government's submission ex parte and in camera. Of course, those parts of the Government's submission that are neither classified nor otherwise law enforcement sensitive should then be provided to the applicant without restriction. The bill also provides that protected information, if necessary to make an accurate determination about the reasonableness or oppressiveness of the order, could be provided to the applicant under appropriate security procedures and protective orders.

By a margin of one vote, the Committee rejected an amendment (also set forth in the appendix to these views) that would have conformed Title V to a key aspect of other major titles of the Foreign Intelligence Surveillance Act. Every other title establishing a method of obtaining foreign intelligence information – Title I on electronic surveillance, Title III on physical

searches, and Title IV on pen registers and traps and traces – provides for exercise of emergency power by the Attorney General. These provisions permit the Attorney General to act when an emergency requires immediate action.

The amendment, offered by Vice Chairman Rockefeller, adhered closely to the emergency provisions in FISA's other titles. If an emergency requires production before a FISA Court order can be obtained, the amendment would authorize the Attorney General to issue an order for production that has the same effect as an order issued by the FISA Court. The safety check on the Attorney General's power is that at the time of issuing that order the Attorney General would be required to notify the FISA Court (as the Attorney General must do for emergency use of other FISA powers) and then apply "as soon as practicable" for a judicial order requiring production. If the application is granted, the Attorney General may continue to use the information obtained under his emergency order. If the application is denied, then the information obtained under the order may not be used.

In sum, under the Rockefeller amendment the Attorney General would be able to act rapidly in an emergency as long as the court is notified and a process, leading to an authoritative ruling of the court, is begun as soon as practicable. In that way, FISA would protect – as it does for electronic surveillance, physical searches, and pen registers – the ability of the Attorney General to act with dispatch while ensuring prompt judicial review. The amendment merits adoption in the course of the Senate's consideration of this bill.

One argument offered in Committee against adding emergency authority to Title V of FISA is that this authority is unnecessary in light of the administrative subpoena power that the bill would grant to the Attorney General. Whether Congress will create a new administrative subpoena authority is, at the present time, only speculative. Title V of FISA is not speculative. It exists. It can and should be improved.

But even if Congress does establish a new administrative subpoena authority, the Department of Justice may conclude, in particular cases, that it advances the Government's interest in the efficient investigation of national security matters to proceed under Title V, including by means of emergency record production orders. For example, emergency orders under Title V may relate closely to other orders in an investigation, such as for electronic surveillance or pen registers. Under the administrative subpoena section of the Committee's bill, legal challenges to those subpoenas may occur in district courts around the country rather than in the Foreign Intelligence Surveillance Court, depending on who goes to court first. By proceeding under Title V, the Government can ensure that all matters about a particular investigation are handled by one court. The Rockefeller amendment would enable the Government to have both an emergency record authority and the ability to consolidate judicial proceedings in one court.

3. Change in definition of "Foreign Intelligence Information"

Section 202 of the bill amends the definition of "foreign intelligence information" in Title I of the Foreign Intelligence Surveillance Act (FISA). As the definition in Title I of "foreign intelligence information" is also the definition used in other titles of FISA – on physical

searches, pen registers and traps and traces, and orders for the production of business records and other tangible things – the amendment to the definition will have an impact on all the investigative methods authorized by FISA.

Section 202 alters the definition of "foreign intelligence information" by providing that the term includes "protection [of the United States] by use of law enforcement methods such as criminal prosecution." Law enforcement methods such as criminal prosecution are key methods of protecting the United States. The question, however, is whether this change in definition would muddy or even jeopardize a salient achievement of the PATRIOT Act, namely, the "significant purpose" test in Section 218.

Section 218 eliminated the prior test, known as the "primary purpose" test, that had been applied by courts and the Department of Justice before the PATRIOT Act. That test had required that the "primary purpose" of FISA collection had to be obtaining foreign intelligence information rather than evidence of a crime. As described by the Department of Justice in a report to the Committee on April 1, 2005, Section 218 eliminated the primary purpose test by allowing FISA electronic surveillance or physical searches to be authorized if foreign-intelligence gathering is a "significant" purpose, thereby eliminating the need for the courts to compare the relative weight of the "foreign intelligence" or "law enforcement" purpose of the search.

But while a foreign intelligence purpose need not be dominant, the "significant purpose" test requires that there be at least "some" such purpose. The Foreign Intelligence Surveillance Court of Review recognized this when it declared: "Of course, if the court concluded that the government's sole objective was merely to gain evidence of past criminal conduct – even foreign intelligence crimes – to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied." *In re: Sealed Case*, 310 F.3d 717, 735 (U.S. FISCR 2002).

The provision of the bill, which was retained at markup by only one vote, would negate that holding of the Foreign Intelligence Surveillance Court of Review and gut the "significant purpose" test in Section 218 by allowing the use of foreign intelligence powers when the sole purpose is to gain evidence of past crimes. By doing so, this provision of the Committee bill could invite a challenge to the constitutionality of FISA based on the argument that if the sole purpose of a FISA order is to obtain evidence of a past crime then the courts must decide whether FISA satisfies the warrant clause of the Fourth Amendment.

The Administration has not requested that Congress change the definition of "foreign intelligence information." Neither the Attorney General nor the FBI Director, in their appearance before the Committee, suggested a desire to change the definition of foreign intelligence information. There has been no showing, in any open or closed setting, that the present and longstanding definition of foreign intelligence information has impeded a single foreign intelligence investigation or criminal prosecution. Nor did the FBI inform Senator Feinstein, in her discussions with the Bureau about her amendment, that it opposed her amendment to strike the provision.

A former Department of Justice official whose service included the current Bush Administration and who was called by the Committee in anticipation that he would address this matter, cautioned:

> First, Section 203 of the Committee's bill would further expand governmental power at a time when the Department of Justice itself has not asked for broader authority. Second, a related point, I fear that any operational benefit from the amendment would not justify the resulting cost in uncertainty about the state of the law. (Testimony of David S. Kris, former Deputy Associate Attorney General, May 24, 2005.)

The Section 203 referred to in Mr. Kris's testimony is Section 202 of the bill as reported.

Not only has the change in the definition of foreign intelligence information not been requested by the Administration, but the Administration has not brought to the Congress's attention any problem with information sharing created by either the PATRIOT Act or the Foreign Intelligence Court of Review decision. To the contrary, as is well known, the Attorney General and the FBI Director credit the PATRIOT Act and the Foreign Intelligence Surveillance Court of Review decision with helping to bring down the "walls" that blocked coordination and cooperation among intelligence and law enforcement officials in the past.

At best, Section 202 of the bill is intended to correct a hypothetical problem. Moreover, the hypothetical is unlikely to arise. It would require a situation in which the Government had sufficient information to demonstrate probable cause that an individual is an agent of a foreign power but has no present interest in the foreign intelligence information that would be collected by a FISA surveillance or physical search of that individual.

Thus, Section 202, which will bring uncertainty to a critical area of the law, addresses neither a realistic nor a demonstrated need. It should be deleted.

4. Roving Wiretaps

Senator Levin offered an amendment that would have required roving electronic surveillance orders under FISA to include a description of the target of the surveillance "sufficiently specific to give some confidence" that the person surveilled is actually the same target for whom the court found probable cause to believe is an agent of a foreign power. The amendment sought only to establish in law what we understand to be current Justice Department practice. Adoption of the amendment would have helped improve public confidence that the government will not be listening in on the private conversations of innocent Americans using roving FISA wiretap orders. Unfortunately that amendment was defeated, by a margin of one vote.

Roving wiretaps permit electronic surveillance of people who may be taking steps, such as switching cell phones or using multiple pay phones or computer terminals, to evade electronic surveillance at a particular location. Under criminal law, an application for a roving wiretap must identify the person against whom the wiretap is sought and make a showing that there is

probable cause to believe that the actions of that person could have the effect of thwarting interception from a specific facility. Under criminal law, a judge may issue a roving electronic surveillance order if he or she determines that such a showing has been adequately made. Under FISA, the FISA Court judge must issue an order if he or she finds probable cause, based on the application, that, in addition to other requirements, the target of the electronic surveillance is a foreign power or an agent of a foreign power. The judge's order authorizing the surveillance must specify the identity of the target only if that identity is known. If it is not known, the order need only contain a description of the target.

In an unclassified portion of a May 24, 2005 letter from the Department of Justice to the Chairman, the Department stated that under FISA:

> the target of roving surveillance must be identified or described in the order of the FISA Court, and if the target of the surveillance is only described, *such description must be sufficiently specific* to allow the FISA Court to find probable cause to believe that the specified target is a foreign power or an agent of a foreign power. As a result, section 206 is always connected to a particular target of surveillance. (Emphasis added.)

Requiring in law, as the Levin amendment sought to do, that FISA electronic surveillance orders be sufficiently specific would be entirely consistent with the Department's statement.

5. Mail Cover

In the 1970's, both a presidential commission (chaired by Vice President Nelson Rockefeller) and a Senate select committee (chaired by Senator Frank Church) brought to light significant abuses by government agencies concerning intrusive examination of the mail. To meet the twin goals of ending abuses while providing federal and state investigators with access to information that can be gleaned from examining envelopes, but not reading the content of sealed letters without appropriate judicial warrants, the Postal Service promulgated regulations. These regulations have been in place for thirty years.

While the Committee has not held a hearing on mail cover issues, its report identifies a few shortcomings with the regulations. In response, the Committee's bill proposes an entire new title of FISA to govern the examination of mail covers. It is not at all clear why legislation is needed. The several issues identified in the Committee report concerning the regulations can be addressed expeditiously by two agencies of the federal government -- the Department of Justice and the Postal Service – working together cooperatively to amend the regulations or improve practices to the extent required. It is our hope that those efforts will begin promptly. If successful, they may obviate the need for legislation.

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For some of us, problems in the Committee bill, several of which would have been remedied by the amendments described above, were sufficient to warrant a "no" vote on the bill. For others of us, a "yes" vote was warranted by the importance of proceeding further in the legislative process with a bill that includes the renewal of PATRIOT Act authorities and

modifications that correct some of the present defects in the law. All of us are united in the conviction that improvements in the bill are essential before final passage. Adoption of the amendments described above would be an important step toward achieving a bill that provides a long-term basis for effective national security investigation authority within the boundaries of our Constitution and values.

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APPENDIX – TEXT OF AMENDMENTS

ADDITIONAL AND MINORITY VIEWS OF SENATORS ROCKEFELLER, LEVIN, FEINSTEIN, WYDEN, BAYH, MIKULSKI, AND CORZINE

1. Amendment Proposed by Sen. Feinstein on Emergency Use of Administrative Subpoenas

[To be inserted in Committee bill, as reported, as a new Section 802 (d)]

(d) Requirement for Emergency Use. -- A subpoena may be issued under this title only after the Attorney General, or a designee of the Attorney General, or the Director of the Federal Bureau of Investigation, or a designee of the Director in accordance with subsection (a), certifies, whether in writing or orally (and if certified orally, then reduced to writing as soon thereafter as possible), that --

(1) it is impracticable to obtain in a timely fashion the records or materials to be required to be produced by such subpoena pursuant to a subpoena or order issued by the Foreign Intelligence Surveillance Court under other provisions of this Act or pursuant to other means; and

(2) there is a reasonable belief that there is an emergency need for such records or materials in order to protect United States persons against terrorism.

(b) Review and Approval. – A subpoena may be issued under this title only after the review and approval, whether orally or in writing, of the subpoena by any of the following:

(1) The Attorney General.

(2) The Deputy Attorney General.

(3) The Associate Attorney General.

(4) An Assistant Attorney General, including an acting Assistant Attorney General.

(5) A United States Attorney.

2. Amendment Proposed by Vice Chairman Rockefeller on Emergency FISA Record Authority

[To be inserted in the Committee bill, as a new Section 211(b), with present subsections (b) - (e) renumbered accordingly]

(b) Emergency Access. --

(1) Notwithstanding any other provision of this section, when the Attorney General reasonably determines that --

(A) an emergency situation exists with respect to the production of tangible things for an investigation described in subsection (a) before an order authorizing production of such tangible things can with due diligence be obtained; and

(B) the factual basis for the issuance of an order under this section to approve production of such tangible things exists,

the Attorney General may issue an order requiring production of such tangible things, which order shall have the same effect as an order issued by the court established by section 103(a), if a judge having jurisdiction under section 103 is informed by the Attorney General, or a designee of the Attorney, at the time of the issuance of such order that the decision has been made to require production of such tangible things under this subsection and an application in accordance with this section is made to that judge as soon as practicable thereafter.

(2) In the event that an application under paragraph (1) is denied, or in any other case where no order is issued by the court established by section 103(a) approving access to tangible things, no information obtained or evidence derived from the production of tangible things under paragraph (1) shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from the production of tangible things under paragraph (1) shall subsequently be used or disclosed in any other manner by any officer or employee of the Federal Government without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(3) The denial of an application under paragraph (1) may be reviewed as provided in section 103.

3. Amendment Proposed by Senator Levin on Administrative Subpoena Nondisclosure Requirements

[To be inserted in the Committee bill, as reported, as new paragraphs (3) and (4) of Section 802(b)]

(3) Limitation on duration of nondisclosure requirements. – Except as provided in paragraph (4), the prohibition on disclosure under subsection (a) with respect to a subpoena under section 802 shall expire 90 days after the date of the issuance of the subpoena.

(b) Extension. – The Foreign Intelligence Surveillance Court, or the United States district court in which a person or entity subject to a prohibition on disclosure under subsection (a) resides or does business, may, upon application by a person authorized to issue a subpoena under section 802, extend a prohibition on disclosure under subsection (a) with respect to a subpoena issued under section 802 for one or more additional periods of not more than 90 days upon a showing by the applicant that a danger to the national security of the United States may result from disclosure that such subpoena was received or records were provided pursuant to this title. Each extension for a period under this paragraph shall require a new application under this paragraph.

MINORITY VIEWS OF SENATOR FEINSTEIN

Although I support the reauthorization of the sunsetting provisions of the PATRIOT Act, I cannot support the legislation in its present form. This legislation contains two provisions that vastly expand current authorities and greatly expand the power of the Federal Bureau of Investigation in conducting intelligence investigations and prosecuting criminal activity. It is disappointing that the majority has refused to accept amendments to place reasonable limits on these new authorities.

Section 202 of the Committee's legislation presents a fundamental change to the laws governing investigations conducted under the Foreign Intelligence Surveillance Act (FISA). The addition of criminal prosecutions to the definition of "foreign intelligence information" allows, for the first time ever, the FBI to use FISA to collect intelligence solely for the use as evidence in a criminal prosecution. This change would undermine current law, passed as part of the PATRIOT Act in 2001 that requires the FBI to articulate a significant intelligence purpose in conducting any FISA investigation. This standard has been praised by Attorneys General Ashcroft and Gonzales and by FBI Director Mueller as a key component to their ability to fight the war on terror.

There has been no request by the Administration for this change to the law, and the FBI did not object to my amendment to strike this language. Section 202 of this legislation undermines the significant purpose test, removes the distinction between intelligence and law enforcement operations within the FBI, and threatens to create uncertainty in the currently well established relationship between intelligence and criminal proceedings.

Section 213 of this legislation authorizes the FBI to issue administrative subpoenas to compel information on anything that can be claimed relevant to an ongoing investigation. This authority can be delegated to an FBI field office without check of a Department of Justice attorney or prior court approval, as is currently required for FISA Business Records requests. As approved by the Committee, this provision would amount to a fishing license of unprecedented proportions.

My amendment to Section 213 would have made two modest but critical changes to this provision: it would have limited the use of administrative subpoenas to emergency situations where life was on the line–which was the only case where the Administration has claimed a need for this authority; and the need for approval (even if done over the phone) by a U.S. Attorney or Department of Justice official.

Proponents of the intelligence administrative subpoena point out that there are already 335 different cases where the federal government has subpoena authority. Very few of these cases involve the Department of Justice, and none pertain to intelligence. More importantly, in those cases, a crime has taken place and a subpoena has to hold up to scrutiny in court. In the intelligence regime, a record just has to relate to something that might happen in the future. There will almost never be any court review, and when there is, the government can argue its case in secret. In fact, the party being issued with the subpoena will almost never be able to disclose the very existence of the subpoena. In these cases, when the government is exercising its authorities behind closed doors, we should be requiring extra safeguards to protect civil liberties, not fewer.

Finally, I supported and regret the defeat of Vice Chairman Rockefeller's amendment to provide the Attorney General with emergency powers under FISA to demand access to business records. This would not have replaced the administrative subpoena authority in the legislation, and would simply have provided emergency use authority as is already on the books for electronic surveillance and physical searches under FISA.

It appears that if administrative subpoena authority is enacted, the FBI will find it an easier mechanism for obtaining records than the FISA Business Records authority provided under the PATRIOT Act. It is thus irrelevant that the Committee has included good legislation to improve these FISA statutes as the authority will not be used. I find it alarming that the Committee has chosen to replace, in effect, the most controversial element of the PATRIOT Act with a far broader subpoena authority subject to fewer checks on abuse.

In short, the Committee's legislation strays from the well-crafted and working balance struck in the PATRIOT Act. The provisions in Sections 202 and 213, neither of which had strong Administration support or justification, make fundamental changes to the way intelligence investigations are authorized and conducted. Both raise serious questions that need to be answered before this legislation is passed by the Senate.

Dianne Feinstein